



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: Steven M. Utter
SERIAL NO.: 09/358,280 EXAMINER: C. Kim
FILING DATE: 07/21/99 A.U.: 3752
TITLE: PORTABLE MIST COOLING DEVICE

GP
4/24/03

37

DECLARATION OF STEVE UTTER UNDER 37 CFR §1.132

I, Steve Utter, declare as follows:

1. I am President and CEO of Misty Mate, Inc.
2. I am a resident of the State of Arizona at the address 25611 S. Val Vista Dr. Chandler, Arizona 85249.
3. I am the inventor of the subject matter described and claimed in the above-identified patent application.
4. I am aware of and understand the above-identified patent application related to a portable evaporative misting apparatus for cooling an individual.
5. I understand the pending claims of the above-identified patent application are directed, in general, towards a portable device for cooling an individual by producing an evaporative mist.
6. Since 1989, Misty Mate, Inc. has designed, manufactured and marketed a highly successful line of personal portable misting devices. These products have generated high demand due to their unique ability to help cool an individual by producing an evaporative mist, thereby cooling the air around an individual without the need to get the individual

wet. This is accomplished by evaporative cooling as the individual directs the evaporative mist near himself/herself. It is recommended that the nozzle be held about 18 inches away from the user and directed towards the user in order to allow the mist to evaporate and not get the user wet. All this is accomplished with the device being portable and, if desired, operated without continual manipulation by the user.

7. In approximately 1993, I made commercially available the personal portable misting device that included a built in pump, which allows the device to reach pressures of 70-100 pounds per square inch (PSI). This high pressure allows for the production of the fine evaporative mist, which is far above the pressures attained by most garden sprayers, typically about 30 PSI.

8. I am not aware of any other personal cooling devices that were commercially available prior to this new personal portable misting device for cooling an individual in a portable manner.

9. Misty Mate's personal portable misting devices account for approximately 80% of the total revenue of Misty Mate, Inc.. Total revenue for Misty Mate was \$1 million in 1994; \$2.0 million in 1995; \$3.5 million in 1996; \$6.9 million in 1997; \$7.5 million in 1998; \$7.5 million in 1999; \$6.1 million in 2000; \$3.9 million in 2001; \$3.6 million in 2002; and \$4.1 million expected in 2003.

10. Advertising expenses directed toward the personal portable misting device for each of the following years are as follows: prior to 1997 – less than \$10,000 per year; 1997 - \$300,000 in direct TV ads in addition to soliciting sales through HSN TV and QVC home shopping TV; 1998 – about \$150,000 on direct TV ads; 1999 – about \$100,000 on direct TV ads; 2000 – about \$50,000 in direct TV ads; thereafter, lesser sums towards print material. Estimates for the current year, 2003, are about \$12,000 towards advertising. At the height of advertising expense, \$300,000 in 1997, the maximum percentage of sales towards advertising was only 4.3% and sales revenue less than in other years with less advertising. Furthermore, advertising expenditure was

drastically reduced because increased spending on advertising never correlated to increased sales and amounted to an unnecessary expense.

11. It is my opinion that the success of Misty Mate's personal portable misting device is directly attributable to the novel features: the nozzle that emits a fine evaporative mist for evaporative cooling and the strap feature that allows the device to remain portable and carried around by the user without holding the device.

12. A company, Arizona Mist, saw the success of Misty Mate's personal portable misting device and copied Misty Mate's invention and introduced a substantially copied product that would infringe the pending claims.

13. Approximately two years after the introduction of Misty Mate's personal portable misting device, a competitor produced a product called Squeeze Breeze. The Squeeze Breeze was essentially a modified spray bottle that incorporated a fan to assist dispersion of the water spray from the spray bottle. This device did not evaporative cool the area around the user and caused the user to necessarily get wet.

14. Subsequent to Misty Mate's introduction of the personal portable misting device, several companies started making cool ties, which are cool neck wraps that can be used as a personal cooler. Also, about two years ago, The Sharper Image introduced a personal portable cooling device that also wraps around an individual's neck. This device basically uses a fan to blow air across a wet pad to cool the individual. Again, this device failed to evaporative cool the area around the user by producing an evaporative mist.

15. The following figures, outside of Misty Mate's revenues, reflect either figures obtained from Dun and Bradstreet Company or estimates based on my extensive knowledge of the cooling device market. Today, Misty Mate enjoys about 95% of the market share of personal portable misting devices (\$4 million in revenue compared to \$500,000 for Arizona Mist). Also, Misty Mate enjoys about 18% of the personal cooling

device market (\$4 million in revenue compared to \$18.5 million for the combination of Arizona Mist (\$500,000) and non-evaporative misting devices: \$8 million for Squeeze Breeze, \$5 million for cool tie companies, and \$5 million for The Sharper Image).

16. In summary, as the facts above show, Misty Mate's personal portable misting devices defined a new market - portable cooling devices, and more particularly, personal portable misting devices. The market share for portable cooling devices has ranged from essentially 100% of the early market to about 18% currently. Furthermore, and particularly more relevant, the market share ranges from essentially 100% of the personal portable misting device market to about 95% currently.

I declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the above-identified application or any patent issuing thereon.

Dated: _____

4-8-07



Steve Utter